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No. 02-1275

Supreme Court, U.S.
FILED
APR 2 2003
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IN THE

Supreme Court of the United States

CONTINENTAL INSURANCE COMPANY,

Petitioner,

—v.—

VIAD CORP and ALLIANZ INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 2, 2003

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STATEMENT PURSUANT TO RULE 29.6

Viad Corp is a publicly-held corporation. It has no corporate parents or affiliates and there are no publicly-held companies that own 10% or more of its stock.

Allianz Insurance Company is a wholly-owned subsidiary of Allianz of America, Inc., which is a wholly-owned subsidiary of Allianz AG, a publicly-held corporation.

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STATEMENT OF THE CASE

This is a garden-variety contract dispute arising from a September 1975 Reinsurance and Assumption Agreement (the "R&A Agreement"), which contains a broad arbitration clause. App. 2. In the R&A Agreement, Continental agreed to assume, reinsure and administer the run-off of all insurance and reinsurance risks written by Viad's then wholly-owned subsidiary, General Fire & Casualty Company ("GF&C").[1] App. 2. Viad transferred more than $20 million in reserves to Continental and agreed to reimburse Continental for claims and expenses that exceeded the reserves as of October 1, 1980. App. 2. Once Continental assumed the GF&C business, Viad sold the "shell" of the subsidiary, which became known as Allianz. App. 7. The transaction enabled Viad to divest itself of its insurance subsidiary, GF&C. App. 7.

A. The 1984 Arbitration Award

In late 1983, a dispute arose regarding the amount of reimbursement for claims and expenses owed to Continental under the R&A Agreement. App. 2. In accordance with the arbitration provision contained in the R&A Agreement, Continental commenced an arbitration to address this dispute. App. 2. In January 1984, the arbitrators issued an arbitration award (the "1984 Arbitration Award") which provided:

> "In payment of $5,340,250.00 the [Viad] Corporation shall be relieved of all liability whatsoever under the Reinsurance and Assumption Agreement assumed by Continental Insurance Company effec-

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[1] An insurer (such as GF&C) that has written occurrence-based policies may continue to face "run-off" claims after the policies have expired, such as environmental damage claims. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 771 (1993).

> tive October 1, 1975, the Continental Insurance Company to be responsible for all liabilities arising from this agreement."

App. 8.

On February 13, 1984, Continental filed an action in the United States District Court for the Southern District of New York to confirm the 1984 Arbitration Award. App. 8. The parties agreed to settle the action and exchange releases. App. 8. On March 15, 1984, the Honorable Abraham Sofaer signed an order (the "1984 Stipulation and Order") closing the case "as settled." App. 8. The 1984 Stipulation and Order provided that, on or before April 1, 1984: (1) Viad would transfer $5,340,250.00 to Continental in full satisfaction of all claims by Continental against Viad and GF&C; and (2) Continental, Viad and GF&C would execute releases that would "provide for the release of any and all claims arising directly or indirectly out of the [R&A Agreement] or the [1984 Arbitration Award], whether or not such claims were actually asserted in the arbitration proceeding resulting in the Arbitration Award." App. 8, 18-19.

The 1984 Stipulation and Order required that the releases be held in escrow by counsel and provided that, if Viad transferred the subject funds on time, the attorneys would deliver the releases to their clients and Continental would dismiss the confirmation proceeding with prejudice. App. 19-20. If, on the other hand, the funds were not delivered, the 1984 Stipulation and Order would be deemed to constitute consent by Viad to the entry of judgment confirming the 1984 Arbitration Award, and the escrowed releases would not be exchanged. App. 20.

In accordance with the 1984 Stipulation and Order, Viad paid the money to Continental and the parties exchanged the releases (the "1984 Releases"). App. 9. Continental remained in possession of the GF&C files it

had acquired in 1975 in accordance with the R&A Agreement and ceased reporting to Viad regarding its claims-handling activities.

B. The 2001 Lawsuit

In 1995, Continental merged with CNA Financial Corporation and the employees who worked for Continental left the company. App. 9. Thereafter, several claims were filed against Allianz for liabilities that allegedly arose under GF&C insurance and reinsurance contracts written before 1975. App. 9. Allianz sought indemnification from Continental under the R&A Agreement. App. 9. Continental, however, sought to disavow its obligations under the R&A Agreement claiming, for the first time, that the 1984 Releases extinguished the R&A Agreement and Continental's liability for the GF&C business it had assumed. App. 3. In July 2001, Continental filed a complaint in the district court against Allianz and Viad seeking: (1) an injunction to prevent Allianz from filing any lawsuit against Continental seeking indemnification under the R&A Agreement; (2) a declaration that Continental has no obligation for any claim arising out of the R&A Agreement; and (3) money damages. App. 9-10. Viad and Allianz moved to stay the action and compel arbitration in accordance with the arbitration provision of the R&A Agreement. Continental cross-moved for partial summary judgment on its claims for declaratory and injunctive relief. App. 3.

C. The District Court's Decision and the 2002 Arbitration Award

On March 23, 2001, the district court issued an Order granting the motion of Viad and Allianz to compel arbitration and denying Continental's summary judgment motion. App. 3. The district court held that neither the 1984 Stipulation and Order nor the 1984 Releases extin-

guished the R&A Agreement or the arbitration agreement contained therein. App. 16. The district court noted that it "defies logic to suggest that Viad intended to release [Continental] from all of its obligations under the R&A Agreement and 1984 Arbitration Award when [Viad] had agreed to pay the amount of money specified in the 1984 Arbitration Award as completing [Viad's] obligations under the R&A Agreement." App. 16.

Thereafter, the parties arbitrated their dispute. In March 2002, the arbitration panel ruled in favor of Viad and Allianz, finding, *inter alia*, that "Continental Insurance Company was, is and continues to be bound by its obligations under the [R&A Agreement]." The parties stipulated to a judgment confirming the award, which was entered by the district court. Pet. at 8, n.1.

D. The Second Circuit's Decision

Continental appealed the district court's decision staying the action, compelling arbitration and denying Continental's motion for partial summary judgment. App. 1. The Second Circuit affirmed the district court's decision by summary order dated December 16, 2002, stating:

> "We find that the parties clearly entered into an arbitration agreement that remained valid and enforceable at all pertinent times. This is true even if, as Continental contends, the 1984 Releases cancelled the R&A Agreement because we find no express rescission of the arbitration provision. Absent an explicit intent to rescind, as the district court noted, the arbitration clause survived any termination of the R&A Agreement."

App. 4.

REASONS THE WRIT SHOULD BE DENIED

The opinion of the Second Circuit does not warrant this Court's review. Neither the Second Circuit's ruling, nor the record below, presents the question described in the Petition. The ruling is not in conflict with the decisions of other circuits and does not have the far-reaching implications asserted in the Petition. In short, Petitioner seeks to make a "federal case" out of what is, and always has been, nothing more than a contract dispute properly adjudicated by an arbitral forum. The Second Circuit's decision is proper in all respects and Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I. NEITHER THE RECORD NOR THE DECISION BELOW PRESENTS THE QUESTION DESCRIBED IN THE PETITION

The question below was whether "the district court had the responsibility to enforce the 'so ordered' Settlement Agreement" but failed to do so. App. 3. All parties and the Second Circuit agreed that the district court was obligated to enforce its prior order. App. 3-4. Therefore, the only disputed issue before the Second Circuit was whether the district court correctly interpreted the meaning and implication of the 1984 Stipulation and Order. The Second Circuit held that the district court "fulfilled this responsibility correctly by interpreting the 1984 Settlement Agreement as not having extinguished either the underlying obligations of the R&A Agreement, or the arbitration clause contained therein." App. 4.

Despite the fact that the Second Circuit, the district court and Respondents all agreed with Continental's contention that a district court is obligated to enforce its

prior order, that contention, twisted into a new form, is at the heart of the Petition. The Petition states that:

> "Continental now asks this Court to decide whether the district court must determine what its own judgments mean, or whether the district court must abdicate its responsibility for interpreting and enforcing its prior judgments to an arbitration panel, as the Second Circuit held."

Pet. at 6. But the Second Circuit held no such thing. Although Continental makes repeated reference to the Second Circuit's purported holding that a district court should "abdicate" its responsibility for interpreting its prior judgment in favor of an arbitration panel, Continental never cites to the portion of the Second Circuit's opinion that says so. Pet. at 6, 9, 10-11. There is a simple reason for the absence of a specific citation to the decision below—the summary order, from caption to conclusion, does not contain any suggestion that a district court should allow an arbitration panel to interpret the court's prior judgment. In fact, the Second Circuit's decision is predicated on the correctness of the district court's interpretation of its prior order. App. at 4.

The Second Circuit's opinion is far more mundane than Continental makes it out to be. The decision arises from the court's application of New York state contract law which led it to conclude that "the parties clearly entered into an arbitration agreement that remained valid and enforceable at all pertinent times." App. 4. The Second Circuit properly relied upon its prior holding in *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 75 (2d Cir. 1997), for the proposition that a "clear and specific waiver [is] required to defeat the express arbitration provision" in the agreement between the parties. App. 4. *See also* App. 15, *citing Schlaifer v. Sedlow*, 51 N.Y.2d 181, 412 N.E.2d 1294, 1296, 433 N.Y.S.2d 67 (1980)).

Once the Second Circuit decided that the arbitration agreement between the parties remained in effect and covered the subject matter of the parties' dispute, it was required to affirm the holding below that referred the parties' remaining disputes to arbitration. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); 9 U.S.C. § 4.

Continental's true grievance here is not that the Second Circuit erred by allowing the district court to "abdicate its responsibilities" in favor of the arbitration panel. Rather, Continental takes issue with the refusal by the Second Circuit and the district court to rewrite the 1984 Arbitration Award, the1984 Stipulation and Order, the 1984 Releases and the R&A Agreement to extinguish Continental's contractual obligation to arbitrate. Of course, such historic revisionism is also not properly within the mandate of this Court.

II. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

In a transparent attempt to grab this Court's attention, and without regard for the reality of what was actually decided below, Continental now contends, for the first time, that decisions of other circuits are in conflict with the Second Circuit's holding. Pet. at 10-14. Continental's claim is meritless.

Continental asserts that decisions of the Third, Fourth, Eighth and Eleventh Circuits conflict with decisions of the Second and Ninth Circuits.[2] Pet. at 11-13. The pur-

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[2] Continental contends that *John Hancock Mutual Life Ins. Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998); *In re Am. Honda Motor Corp.*, 315 F.3d 417 (4th Cir. 2003); *In re Y&A Sec. Litig.*, 38 F.3d 380 (8th Cir. 1994); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067 (11th Cir. 1993), conflict with *United States Fire Insurance Co.*

ported conflict relates to the question of who, as between a court and an arbitration panel, should decide the *res judicata* or collateral estoppel effect of a prior federal court judgment on a subsequent arbitration.[3] However, neither *res judicata* nor collateral estoppel has anything to do with this case. Continental did not claim *res judicata* or collateral estoppel in the district court or the Second Circuit. Nor do the words *res judicata* or collateral estoppel ever appear in the Second Circuit's opinion. To the contrary, the claims and issues before the district court could not have been precluded under either doctrine because the 1984 Stipulation and Order did nothing more than give the district court's imprimatur to the parties' agreement to comply with the 1984 Arbitration Award and to exchange the 1984 Releases. As the district court stated:

> "Judge Sofaer did not decide the issue of liability for the [incurred but not reported] claims. The 1984 Stipulation and Order does not, as Plaintiff argues, order the release of those claims. It also does not

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v. National Gypsum, Co., 101 F.3d 813 (2d Cir. 1996); *National Union Fire Insurance Co. v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996) and *Chiron Corp. v. Ortho Diagnostics Systems, Inc.*, 207 F.3d 1126 (9th Cir. 2000).

[3] It is questionable whether a circuit split even exists regarding this question. Several of the circuit courts whose decisions form part of the alleged split predicate their holdings on an interpretation of the intent of the parties to the underlying agreements to arbitrate, as opposed to any broadly-applicable legal principle. *See United States Fire*, 101 F.3d at 817 (holding that whether a collateral estoppel defense is itself arbitrable, like any other ambiguity in the scope of arbitration, must stem from the language of the arbitration agreement itself, because arbitration is a matter of contract); *Chiron*, 207 F.3d at 1130 (9th Cir. 2000) (holding that the express terms of the arbitration agreement "unambiguously reflect the parties' intent both to arbitrate disputes arising from the [agreement] and to be bound by arbitration decisions that resolve such disputes").

> dismiss the case with prejudice. Rather, the Order closes the cases as settled and describes the actions that the parties have agreed to take, including the future exchange of releases and Continental's future consent to dismiss the case."

App. 11.

Continental also claims that the Second Circuit "reiterated its view that an arbitration panel should decide what the prior judgment means and whether the prior judgment precludes the claims being arbitrated." Pet. 10-11. But the Second Circuit said no such thing and made no reference to *United States Fire*, 101 F.3d 813, or *National Union*, 88 F.3d 129, the two prior Second Circuit decisions that Continental claims give rise to the alleged circuit split. The reason those cases do not appear in the Second Circuit's opinion is simple. The issues decided below have nothing to do with *res judicata* or collateral estoppel. This case does not implicate any circuit split and does not warrant certiorari review.

III. THIS COURT HAS THREE TIMES BEFORE DENIED CERTIORARI REVIEW OF CASES THAT FORM THE PURPORTED CIRCUIT SPLIT

Petitioner's misplaced effort to implicate a circuit split falls short of the mark for another reason. On three prior occasions, this Court has considered petitions for certiorari review of precisely those decisions that Petitioner claims give rise to the circuit split. In each instance, this Court denied review of essentially the same question as presented by this Petition. *See Olick*, 151 F.3d 132, *cert. denied*, 535 U.S. 1056 (2002); *United States Fire*, 101 F.3d 813, *cert. denied*, 521 U.S. 1120 (1997); *Kelly*, 985 F.2d 1067, *cert. denied*, 510 U.S. 1011 (1993).

IV. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS

Continental contends that the question presented by the Petition is important because the Second Circuit's decision undermines the purpose of the Federal Arbitration Act by rendering finality impossible. Pet. at 15. Continental claims that the "rule" promulgated by the Second Circuit will result in "an endless series of arbitrations and ensuing litigations."[4] Pet. at 15. However, Continental's parade of horribles could easily have been averted by the parties in this case, or in future cases. Parties seeking to extinguish their obligation to arbitrate need only agree expressly to rescind their arbitration agreement. App. 4. Here, the parties did not. The only reason for the seemingly endless circle of arbitration and litigation is Continental's steadfast refusal to live up to its contractual obligations. Under these circumstances, even the rule Continental seeks would simply substitute an endless series of litigation for one of litigation and arbitration. This Court should give the parties the finality they all seek by denying the Petition.

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[4] Continental's claim that the Second Circuit's holding will have far-reaching consequences is particularly dubious considering that it is an unreported decision, not to be cited as precedential authority. *See Local Rule of the Second Circuit § .23.*

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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Dated: April 2, 2003